1-1700-10506-2
DHR File No. ER 19950077

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Virginia Twetten,

Complainant,

vs.

County of Mille Lacs,

Respondent.

ORDER FOR SUMMARY JUDGMENT

By a written motion filed August 16, 1996, Respondent, Mille Lacs County seeks an Order Granting Summary Judgment in its favor in this matter. The Complainant, Virginia Twetten, filed her Memorandum in opposition to the Summary Judgment Motion on September 5, 1996. The Respondent filed a reply Memorandum on September 11, 1996. The Motion was argued orally at the Office of Administrative Hearings on Friday, September 13, 1996 at 2:00 p.m. The record in this matter closed on September 20, 1996, the last date for submission of legal authorities from the parties.

The Respondent was represented by Carole Lofness Baab, Esq. of the firm of Johnson and Condon, P.A., 7235 Ohms Lane, Minneapolis, Minnesota 55439-2152. The Complainant was represented by Sonja Dunnwald Peterson, Esq., of the firm of Horton and Associates, 4930 West 77th Street, Suite 210, Minneapolis, Minnesota 55435-4804.

Based upon the memoranda filed by the parties, the oral argument, all of the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED: that summary judgment is granted in favor of the Complainant. The Respondent shall:

1. Cease and desist from engaging in unfair discriminatory practices against qualified disabled persons.

2. Provide the Complainant with assistance to enable her to transfer from and into her van at the workplace and to assist her in using the restroom at the workplace.

3. Pay to the Complainant damages to compensate her for her expenditures for assistance for transfer from and to her van and in the restroom at her workplace since January 1, 1995.

4. Pay to the Complainant her reasonable attorney fees incurred to resolve this matter.

5. Pay to the Commissioner of the Department of Human Rights all amounts billed to the Department by the Office of Administrative Hearings in connection with this case. This amount is $2,593.40.

6. This decision becomes final on October 31, 1996, if Complainant does not request a hearing on damages.

7. All payments ordered shall be made within 60 days of this decision becoming final.

Dated this 17th day of October, 1996.

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GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Respondent, Mille Lacs County, seeks a summary judgment in its favor in this case. Summary judgment is appropriate where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Minn. Rule pt. 1400.5500 (K); Minn. Rule Civ. Proc. 56.03. A genuine issue is one which is not sham or frivolous and a material fact is one which affects the outcome of the case, Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808, (Minn. Ct. App. 1984), rev. denied (Minn. Feb. 6, 1985). The moving party must first show facts that establish a prima facie case and assert that no genuine issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 582, (Minn. 1988). The non-moving party must then show that there are specific facts in dispute which have a bearing on the outcome of the case. Highland Chateau, supra, 356 N.W.2d at 808. Under Minn. Rule Civ. Proc. 56.05 the non-moving party may not rest upon mere averments or denials, but must present specific facts showing that there is a genuine issue for hearing. If the non-moving party fails to rebut specific facts presented in the motion, no question of material fact may exist and summary judgment will be appropriate. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715, (Minn. Ct. App. 1988). Affidavits are a proper means of presenting facts in support of or opposing a motion for summary judgment. Kessel v. Kessel, 370 N.W.2d 889, 894, (Minn. Ct. App. 1985).

Virginia Twetten has been employed as a social worker with Mille Lacs County since 1970. In 1982 Ms. Twetten was diagnosed with multiple sclerosis, a chronic slowly progressive disease of the central nervous system. Her physical condition has significantly deteriorated over the last few years. She is presently confined to a wheelchair. As her disability has progressed, Ms. Twetten found it more and more

difficult to accomplish physical tasks at work, such as getting in and out of her van and taking restroom breaks at work during the day. This is because she lacks the physical strength necessary to transfer herself from chairs. Beginning in approximately 1989, some of Ms. Twetten's co-workers began to assist her in accomplishing these physical tasks by providing her with transfer assistance at work. In approximately 1990, Mille Lacs County adjusted Ms. Twetten's desk so that it is wheelchair accessible and also made modifications to the public restroom to accommodate Ms. Twetten.

Beginning in 1993, upon arriving at work, Ms. Twetten would drive her van into her reserved handicapped parking space in the parking lot adjacent to the building in which she works. A co-worker would then come to the van, Ms. Twetten would turn her seat 90 degrees and the co-worker would slide a transfer board underneath her and help her slide across into the wheelchair by pulling her by her waist across the board and into her wheelchair. The co-worker would then open the door to the outside of the van, lower the lift and bring Ms. Twetten down in the lift. The co-worker would then help push Ms. Twetten into the courthouse. She would go into the elevator alone to get downstairs to her office area and would push herself to her cubicle. When Ms. Twetten left for the day, a co-worker would help her again. The transfer in the county's parking lot takes about five minutes.

At times in 1993, and generally in 1994, Ms. Twetten would also need transfer assistance in the restroom at the workplace. After lunch between 1:00 to 1:30 p.m. Ms. Twetten would push herself to the elevator and go up to the first floor where the handicapped restroom is located. She would push herself into the handicapped toilet stall, and transfer herself from the wheelchair to the toilet using the transfer board. When she was done using the toilet, a co-worker would then help her transfer back to the wheelchair, by pulling her by her waist across the transfer board from the toilet to the wheelchair. This transfer assistance also takes about five minutes.

In late October of 1993 the Mille Lacs County Coordinator, Marion Bayer, first learned that for some time Ms. Twetten's co-workers had been assisting her in transferring her as described above. The matter came to Ms. Bayer's attention because some of Ms. Twetten's co-workers had expressed concerns to their supervisor about the increased frequency of Ms. Twetten's requests for assistance and about their fear of injury to themselves or Ms. Twetten.

On December 13, 1993, Ms. Bayer met with Ms. Twetten and advised her that she would need to make arrangements to handle the "personal needs" of transferring from her van to her wheelchair and transferring from the toilet to the wheelchair. The County did advise Ms. Twetten, however, that a travel assistant was available for business related travel including transferring her from her vehicle to her wheelchair. Ms. Bayer expressed concern to Ms. Twetten about the County's liability in the event that a co-worker helping was injured.

On or about January 5, 1994, Ms. Twetten requested a handicapped parking space in the County's parking lot and arrangements were made for the space and a

sign ordered. The County also designated a co-worker of Ms. Twetten's to open the entrance door to the building until it could be modified. In February of 1994 an automatic door was installed. Effective June 6, 1994, the County granted Ms. Twetten's request to reduce her work hours to 20 hours per week. Additionally, a co-worker was designated to aid her in getting to the courtrooms from her work area for court appearances.

On December 5, 1994, a County employee complained that Ms. Twetten was calling him everyday before and after work hours to request assistance for transferring her in and out of her vehicle. Ms. Bayer then met with Ms. Twetten on that date and advised her that co-workers would no longer assist her with toileting or transfers to her vehicle before and after work effective January 1, 1995. Since that time Ms. Twetten has hired a personal assistant to help her with transfer from and into her van and with the transfer in the restroom. The cost has been approximately $1,200.00 per year. Ms. Twetten filed a charge of disability discrimination against the Respondent, Mille Lacs County, with the Department of Human Rights on January, 19, 1995, alleging disability discrimination. On April 22, 1996, the Commissioner of Human Rights referred this charge to the Office of Administrative Hearings.

The Respondent asserts that there are no material facts in dispute, namely those facts which may affect the outcome of the case. The County asserts that summary judgment must be entered where the material facts are undisputed and as a matter of law compel only one conclusion. Kaczor v. Murrow, 354 N.W.2d 524, 525 (Minn. Ct. App. 1984). The Complainant argues that numerous issues of material fact exist. However, the Complainant has not pointed out, either in her brief or oral argument, any specific material fact which is disputed by the parties. Rather, the Complainant argues that the determination of what is a reasonable accommodation is necessarily a fact specific inquiry to be conducted on a case-by-case basis. Borkowski v. Valley Central School District, 63 F.3d 131, 138 - 40 (2d Cir. 1995). While it is often the case that a determination of whether or not a requested accommodation is reasonable would require the resolution of a number of facts, this is not always the case. Summary judgment may be appropriate in limited instances in which there is no dispute as to what accommodation was requested and offered. Vande Zande v. State of Wisconsin Department of Administration, 851 F. Supp. 353, 2 AD Cases 1846 (W. Dist. Wisc. 1994), aff'd. 3 AD Cases 1630, 1640, (7th Cir. 1995).

Although the submissions indicate disagreement among the parties on some facts, such as whether the Complainant was told that her co-workers had complained about helping her, there is no dispute on any material facts such as the assistance given to the Complainant in the past, what she has requested or exactly what assistance she requires in transferring from her van to the wheelchair or transferring in the restroom. The case is simplified because the employer's position is that the two accommodations requested are not reasonable and are not required under the law. Additionally, the County concedes, for the purposes of the summary judgment motion only, that Ms. Twetten is a qualified disabled person under the Human Rights Acts, that the County would suffer no undue hardship in making the Complainant's requested

accommodations, and that making such accommodations would not cause imminent risk of harm to the health or safety of the Complainant. Respondent's Memorandum of Law, page 9. Accordingly, since there are no material facts in dispute, this matter is appropriately resolved by applying the law to the accommodation requested by the Complainant.

The Minnesota Human Rights Act provides that it is an unfair discriminatory practice for an employer "to discriminate against a person with respect to . . . terms, . . . conditions, facilities or privileges of employment" on the basis of disability. Minn. Stat. § 363.03, Subd. 1 (2)(c). Additionally, the Act makes it an unfair employment practice for an employer with the requisite number of employees "not to make reasonable accommodation to the known disability of qualified disabled person . . . unless the employer . . . can demonstrate that the accommodation would impose an undue hardship on the business, agency or organization." Minn. Stat. § 363.03, Subd. 1(6), "Reasonable accommodation" is defined in the statute to mean:

> steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person. 'Reasonable accommodation' may include but is not limited to, nor does it necessarily require:
>
> (a) making facilities readily accessible to and usable by disabled persons; and
>
> (b) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.

Minn. Stat. § 363.03, subd. 1(6). "Physical access" is defined in the Act at Minn. Stat. § 363.01, Subd. 29, as:

> (1) The absence of physical obstacles that limit a disabled person' opportunity for full and equal use of or benefits from goods, services, and privileges; or when necessary, (2) the use of methods to overcome the discriminatory effect of physical obstacles. The methods may include redesign of equipment, assignment of aides, or use of alternate accessible locations.

In construing the Minnesota Human Rights Act the Minnesota appellate courts often looked to similar federal legislation and case law such as Title VII of the federal Civil Rights Act, the Americans with Disabilities Act (ADA), and the federal Rehabilitation Act. Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 801 (Minn. 1995). Roberts v. Kindercare Learning Centers, Inc., 86 F.3d 844, 845 (8th Cir. 1996). Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn. Ct. App. 1995). Although federal precedent may not be controlling, it is certainly helpful and instructive.

The federal regulations implementing the ADA provide some interpretation. They define reasonable accommodation to include “making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and . . . the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.” 29 CFR 1630.2 (o)(2)(i) and (ii). The interpretative guidelines provided in the appendix to the regulations indicates that “in general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. . . (including) (2) accommodations that enable the employers employees with disabilities to perform the essential functions of the position held or desired;” 29 CFR App. 1630.2 (o).

The interpretive guidelines to Section 1630.9, "Not Making Reasonable Accommodation", indicate that:

> This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with the disability. Thus, if an adjustment or modification is job related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.

29 CFR App. 1630.9.

The guidelines also state:

> The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities, or equipment.

29 CFR App. 1630.9.

In regard to the issue of assistance with toileting, the employer also suggests that 28 CFR § 36.306 should be applied; it provides as follows:

> This part does not require a public accommodation to provide its customers, clients, or participants with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eye glasses or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing.

Although the specific mention of toileting is worthy of note, these regulations interpret Title III of the ADA which prohibits discrimination by public accommodations and commercial facilities dealing with customers and clients. The provisions of the ADA dealing with employees and employers are contained in Title I.

In regard to the issue of transfer from a motor vehicle to a wheelchair at the job site, the County sites an opinion issued by an EEOC deputy legal counsel on May 4, 1995, which states in part:

> Transferring from an automobile to a wheelchair upon arrival at the workplace is part of the process of commuting to and from work. Although the transfer may take place on or near the employer's premise, the physical barrier encountered is one that exists apart from the work environment. Thus, unless an employer provides assistance for employees without disabilities in getting to and from work, the employer does not have to provide assistance to employee with a disability in transferring from an automobile to a wheelchair.

7 NDLR ¶ 64 (E.E.O.C. 1995). The opinion is directly on point. The Complainant points out, however, that the letter indicates that it is an informal discussion of the issues raised and its not an official opinion of the EEOC.

The employer argues that the accommodations requested by the Complainant are unreasonable and are not essential to the performance of her duties as a social worker. It characterizes transfer from a motor vehicle as a personal need occurring on Complainant's personal time and it suggests that assistance with toileting is a matter of such a personal nature that requiring an employer to assist oversteps the requirements of the ADA. The County points out that the fact that its employees have assisted the Complainant in the past does not mean that the County has conceded the reasonableness of the requested accommodations. Vande Zande v. State of Wisconsin, 44 F.3d 538, 545 (7th Cir. 1995).

The Complainant argues that her request is supported by the case of Lyons v. Legal Aid Society, 68 F.3d 512 (2d Cir. 1995). In that case the Court held that failing to provide a disabled employee with financial assistance for a parking space near her office constituted an actionable disability discrimination claim. The Court stated:

> In support of the Order of Dismissal in the present case, Legal Aid argues that Lyons' claim for financial assistance in parking her car amounts to a demand for unwarranted preferential treatment because the requested accommodation is merely 'a matter of personal convenience that she uses regularly in daily life.' . . . It is clear that an essential aspect of many jobs is the ability to appear at work regularly and on time, see, e.g., Carr v. Reno, 23 F.3d 525, 530, (DC Cir. 1994). ('An essential function of any government job is the ability to appear for work'), and that Congress envisioned that employer assistance with transportation to get the

> employee to and from the job might be covered. Thus the report of the House of Representatives Committee on Education and Labor noted that a qualified person with a disability seeking employment at a store that is 'located in an inaccessible mall' would be entitled to reasonable accommodation in helping him 'get to the job site'. HR Rep. No. 485, 101st Congress, 2d Sess., pt. 2, at 61 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 343.

68 F.3d at 516. The legislative history for Title I - Employment of the ADA (cited by the Lyons Court), before the Education and Labor Committee of the House of Representatives, under the heading of "Specific Forms of Discrimination Prohibited" states in full:

> Finally, as a last example, assume that a store is located in an inaccessible mall, and a disabled person wished to apply for a job in the store. The following approach would be followed. The store should take the person's application and determine if the person is qualified for the job. The question then becomes whether, with reasonable accommodation, the person can get to the job site. This reasonable accommodation, of course, has an undue hardship limitation.

1990 U.S.C.C.A.N. 303, 343.

Based on Lyons the Complainant argues that her ability to appear for work is not possible without help in transferring from her van to her wheelchair and help transferring in the restroom. The County argues, to the contrary, that Ms. Twetten already has the accommodation requested in Lyons, namely a reserved handicapped parking space.

The mandate of the MHRA is that an employer must make a reasonable accommodation for a disabled employee, which may include making facilities usable by the employee and may include the provision of aides on a temporary basis. The federal law echoes this requirement and the federal regulations indicate that an accommodation is a change in the way things are customarily done that allows the disabled person to perform the job. The regulations are also clear, however, that an accommodation that is primarily for the personal benefit of the employee is not required.

Under the federal regulations, an adjustment that assists the employee on and off the job is a personal item and need not be supplied. Examples of personal items include prosthetic limbs, guide dogs, eyeglasses and wheelchairs. However, the employee in this case is not requesting assistance which will benefit her outside the workplace. She pays for and arranges for these services at home. Rather, the accommodation assists the employee in performing the duties of this particular job. 29 C.F.R. App. 1630.9. As in Lyons, there is no suggestion that the accommodations requested were sought for any purpose other than to enable Ms. Twetten to reach and perform her job. The County also argues that toileting assistance is of a personal nature, which is a different question. The fact that an accommodation requires

assistance in a normally private area is irrelevant if the accommodation is needed to allow an employee to do the job. The employer may choose not to have fellow employees assist Ms. Twetten in favor of a health aide who has experience in such matters, but the accommodation cannot be denied on the grounds that it involves a sensitive area.

The opinion of the EEOC attorney regarding transfer to a wheelchair from a van seems to conflict with the legislative history cited above, as well as the Carr and Lyons opinions. The legislative history indicates that getting a person to the job site, for example to a store in an inaccessible mall, is a reasonable accommodation. The court in Lyons and Carr seem to indicate that the ability to appear for work is an essential function of a job and Lyons even states that employer assistance with transportation to get the employee to the job might be covered. The County acknowledges that it has a responsibility inside the worksite to help Ms. Twetten move around, to get to a courtroom, for example. It also provides her with assistance when she is on the road on business. Yet it maintains that providing help from the van to the wheelchair is not required.

Ms. Twetten is able to present herself for work in her van in the parking lot adjacent to her place of work. Assistance to permit her to enter the building is reasonable. To arbitrarily classify everything outside the building as "commuting" and therefore outside the employer's responsibility ignores the basic mandate of the MHRA and the federal law which is to require employers to provide assistance at the workplace that allows a qualified disabled person to do the job. It is the language and legislative intent of the MHRA which must control. If the provision of a nearby parking space is appropriate, as the employer concedes, assistance in the next step towards the office, namely help in transferring from the van, cannot be unreasonable. Ms. Twetten cannot do the job she is qualified to do without help in entering the building from the parking lot.

The Respondent agrees that it is responsible for making sure that the restroom is accessible for use by a disabled person and it has laudably made changes in the restroom to accommodate Ms. Twetten. These accommodations, however, do not render the restroom usable by the Complainant as her physical strength wanes. The legislative intent to remove barriers to equal employment opportunity for disabled persons would ring hollow if the restroom were not usable by an employee. The MHRA and the federal regulations specifically require facilities to be accessible to and usable by individuals with disabilities. The provision of aides on a periodic basis is specified as an appropriate accommodation. Minn. Stat. § 363.03, subd. 1(6). The fact that this accommodation is necessary due to the lack of physical strength on the part of the employee does not excuse the employer from removing this barrier to a job she is ready to perform. This is not a case where the employee is simply unable to perform the essential functions of the job. See, e.g., Reigel v. Kaiser Health Plan of North Carolina, 859 F.Supp. 963, 973 (E.D. N.C. 1994). The Complainant obviously must be able to use the restroom during the workday in order to perform her job. The federal regulation applying to public accommodations does not provide much help in this case because of the differing obligations of vendors and employers.

The federal case law indicates that the burden on the employer is an important factor in judging the reasonableness of an accommodation. Lyons, supra. Even though the County has conceded the undue burden issue for the purposes of this motion, it is still relevant, especially in the case of a public employer. The record indicates that the requested accommodation can be accomplished by the County in a cost effective manner. In contrast, the cost to the employee may amount to 10 percent of her gross salary. Ms. Twetten, who is a 20-year employee, is presently employed only half time. Although she likely hopes to work as long as possible, the length of her future employment must be regarded as uncertain. Accordingly, the cost of the requested accommodation is a factor weighing on the side of the employee in this particular case.

Under Minn. Stat. § 363.071, subd. 2, the Complainant is entitled to compensatory damages. Since she is still employed by the County, Ms. Twetten's compensatory damages are limited to the expenditures she has had to make to provide her the assistance she needs. The record indicates this amounted to approximately $1,200. Trebling of the damages is inappropriate in this case as is any award of punitive damages since the record does not show any deliberate disregard of the Complainant's rights (Minn. Stat. § 549.20) or intentional discrimination. To the contrary, the County has made numerous accommodations for the Complainant and its refusal to provide the requested accommodations is based on an arguable interpretation of state and federal law. The parties acknowledge both a lack of specificity in the MHRA concerning what constitutes a reasonable accommodation as well as a paucity of Minnesota and federal case law which is helpful in this case. Neither is it appropriate in this case to award a civil penalty since intentionality is lacking and the financial resources of a public employer are not substantial. An award of attorney fees must be made, however, in order to make the Complainant whole. Anderson v. Hunter, Kerth, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988). The statute also mandates an award of hearing costs, namely the costs incurred by the Department of Human Rights for the services of the Office of Administrative Hearings. Minn. Stat. § 363.071, subd. 7. If the parties are unable to agree on the amount of damages and/or attorney fees, a petition procedure to establish the appropriate amount may be requested.

Finally, the Complainant has asserted a claim for mental anguish or suffering in connection with the County's refusal to provide the requested accommodations. Should the Complainant wish to pursue this claim, and/or should the parties be unable to agree upon a resolution of this claim, a hearing will be necessary to consider what damages are appropriate, if any. Complainant must notify the Administrative Law Judge on or before October 31, 1996, whether she wishes to request a hearing on damages for mental anguish. This decision is not final or appealable until that date.

G.A.B.